THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Hon. Jocelyn Newman, Circuit Court Judge

Davia Bunch and Casey Kelly,
individually and on behalf of others similarly situated

Appellants,

v.

The University of South Carolina,

Respondent.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. When Appellants registered for classes that they paid USC for, they expressly selected "Face-to-Face Instruction" in the "Instructional Method" field. Did the circuit court err in ruling that, as a matter of law, the contract between Appellants and USC did not contain any requirement for face-to-face instruction?
2. Appellants' claims against USC sound in contract. Did the circuit court err in dismissing these claims on sovereign immunity grounds notwithstanding the Supreme Court's holding in *Kinsey Construction Co. v. S.C. Dep't of Mental Health* eliminating the State's immunity from suits based on its contractual obligations?
3. Appellants signed up for face-to-face instruction but instead received remote instruction. Did the circuit court err in ruling that receiving a different service than bargained for did not constitute a legally cognizable harm?
4. In the operative pleading, Appellants expressly disclaimed any reliance on a difference in *quality* between face-to-face instruction and remote teaching. The circuit court nonetheless dismissed Appellants' claims based on the educational malpractice doctrine, which holds that courts should not judge certain academic decisions. Did the court err in finding Appellants' claims barred by the educational malpractice doctrine in contravention to numerous court decisions from around the country?
5. The circuit court also found that the impossibility doctrine executed any non-performance by USC. However, the court ruled as a matter of law that no restitution was recoverable because the remote instruction USC provided was "substantially equivalent" to the face-to-face instruction Appellants contracted for. Did the court err

by determining a factual question in favor of the party moving for summary judgment in the face of disputed evidence?

6. Appellants filed this lawsuit immediately after the Spring 2020 semester. The circuit court held that, to maintain this lawsuit, Appellants should have immediately dropped out of school in the middle of the semester rather than receive online instruction, which would have exacerbated (rather than mitigated) their damages. Did the court err by finding Appellants acquiesced to the termination of face-to-face instruction?
7. Did the circuit court err in denying Appellants' promissory estoppel and unjust enrichment claims based upon the same disputed facts underlying their contract claim?

STATEMENT OF THE CASE

Appellants filed this class action lawsuit against the University of South Carolina ("USC") on May 13, 2020, seeking a prorated refund of tuition and fees paid by Appellants and the putative class members for the Spring 2020 semester based on USC's decision to unilaterally transition all classes to online instruction in response to the COVID-19 pandemic. After defeating USC's motion to dismiss, Appellants filed the operative Second Amended Complaint on August 2, 2022, in which Appellants asserted claims for breach of contract, unjust enrichment, and promissory estoppel. USC answered one month later and filed a motion for summary judgment on June 14, 2023. After further briefing and oral argument on November 20, 2023, the circuit court granted summary judgment on all claims by its written Order of February 2, 2024. Appellants timely filed a notice of appeal on March 1, 2024.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, applying the same legal standard as the trial court. *See, e.g., USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Under Rule 56(c), summary judgment is inappropriate unless the moving party shows that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c).

Importantly, "summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Nelson v. Charleston Cnty. Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). It is "not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995). Importantly, "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Nelson*, 362 S.C. at 5. And "[e]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.*

ARGUMENT

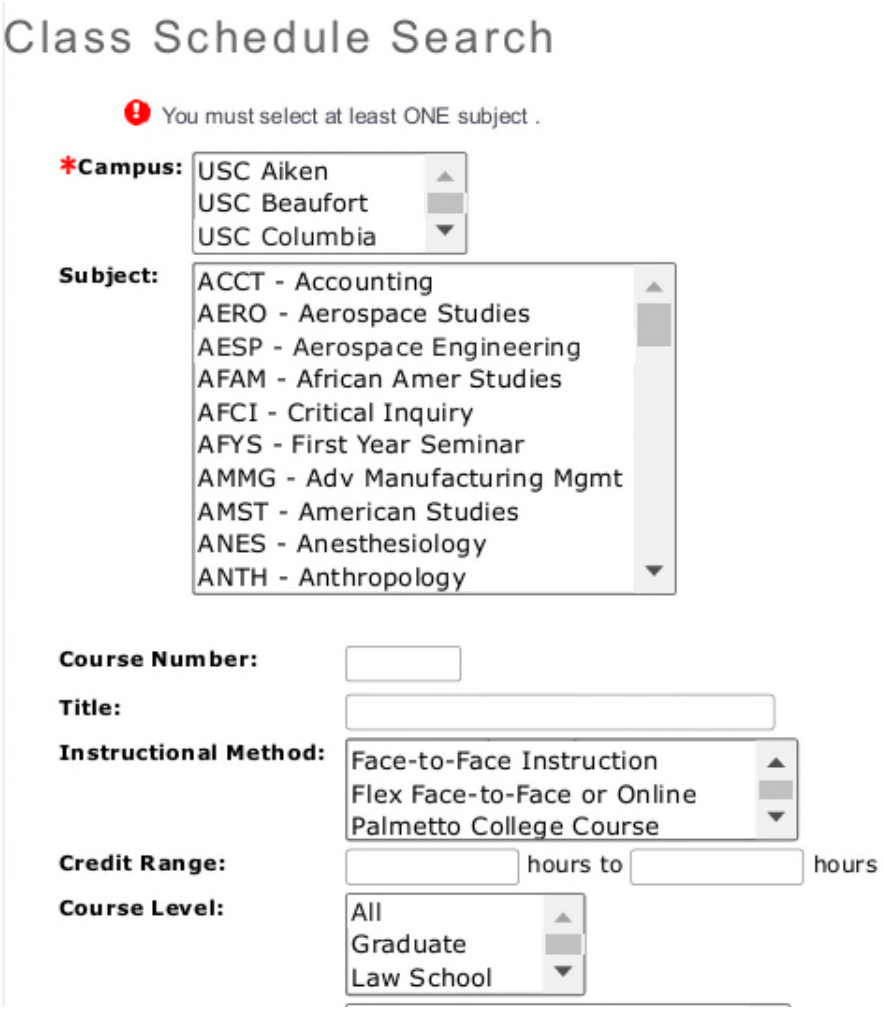
The circuit court erred in granting summary judgment by flipping on its head the well-established principle that "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed *most strongly* against the moving party." *Nelson*, 362 S.C. at 5 (emphasis added). Instead, the circuit court reversed the presumption by resolving disputed facts in favor of the moving party (USC).

I. Statement of Facts

A. During Course Selection, Appellants Affirmatively Selected In-Person Instruction, a Material Term of the Agreement between Them and USC.

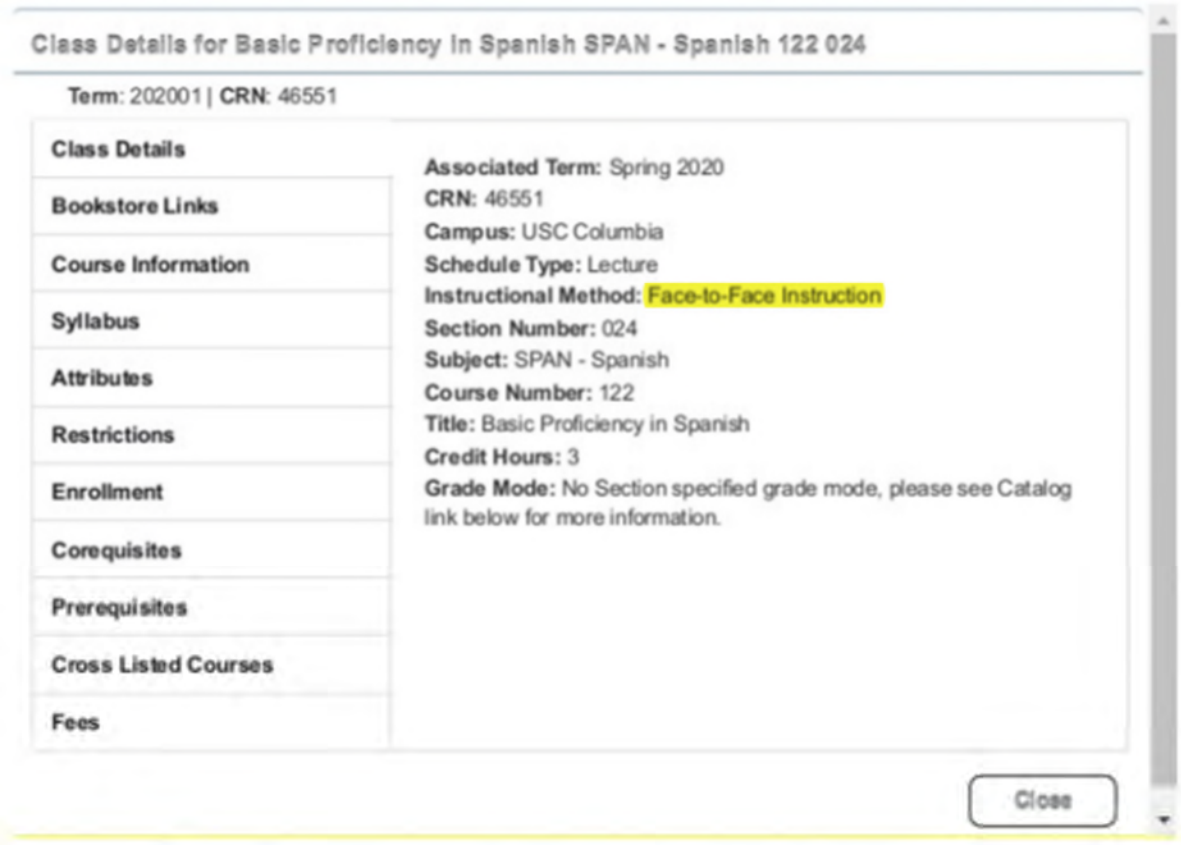
Appellants Davia Bunch and Casey Kelly were students at USC for the Spring 2020 semester. USC concedes that a contractual relationship existed between it and Appellants. Like all other students, Appellants selected classes to take from USC's course offering and paid the University for receiving instruction.

A clear understanding of the course selection process is important for evaluating the issues in this appeal. The only way USC allowed Appellants to register for classes was through "Self Service Carolina," a web-based registration platform. (R. p.1059 ("[T]here are no other options for a student to physically register. . . . Self Service is the only way that they can register."); R. p. 1074; R. pp. 1107–1108 ("[W]e all go through the same process of registering online for face-to-face instruction . . . [and] we all have the exact same service, Self Service Carolina system.").) Reproduced below is a screenshot of what Appellants saw when using Self Service Carolina. (R. pp. 1069–70.)



As the image shows, students can select the Instructional Method of their choice, and course selections specifically identify the Instruction Method by which courses are offered. Face-to-Face Instruction stands in contrast to other options including Palmetto College Course, which typically reflects a student's choice of online classes, as Palmetto College provides classes offered primarily through online teaching. Receiving face-to-face instruction was important to Appellants. (R. p. 1052; R. pp. 1077–78 ("[W]e went through all those filters. And then if these three course numbers have the filters that I want and show me face-to-face instruction on Monday, Wednesday, Friday, [and] have seats left, I'm picking that one.").)

Moreover, once Appellants chose a specific course offering, Self Service Carolina identified the "Instructional Method" for that course, as shown in the picture below. (R. pp. 1060–68; R. pp. 1075–76 (explaining that, when registering for classes, "face-to-face instruction" in the dialogue box description pictured below meant that the course was face-to-face in a physical classroom).)



Hence, during the course selection process, USC represented to Appellants multiple times that the classes they selected would be taught through face-to-face instruction. (R. pp. 1160–1070.) And both Appellants testified that they saw and selected this instructional method, and did so to receive face-to-face instruction. (R. pp. 1105–06 ("[T]hat last semester . . . I specifically chose [courses] because of the face-to-face experience."); R. p. 1086 (Q: "What type of instructional method did you choose?" A: "Face-to-face instruction."). USC itself recognizes

that students "have an expectation that the class will be taught **in the method** that is specified in Self-Service Carolina." (University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022 (emphasis added).)[1] Indeed, as USC acknowledges, the Instructional Method is so important that it cannot be changed absent permission of a dean. *Id.*

B. Appellants Paid Tuition for Face-to-Face Instruction and Fees for On-Campus Services.

As a prerequisite to access Self Service Carolina and select their courses, Appellants, like all students, were required to execute a written "Statement of Financial Responsibility." (R. pp. 1049–50; R. pp. 599–600; R. p. 1100 (Plaintiff Kelly's Statement of Financial Responsibility); R. p. 1132 (Plaintiff Bunch's Statement of Financial Responsibility).) In pertinent part, the Statement of Financial Responsibility provides:

> The University of South Carolina requires all students acknowledge the ***financial arrangement*** between the student and the University. ***By submitting course registration I am entering into a financial arrangement with the University***, and I accept responsibility for all charges billed to my account. I understand that my USC bill will be posted online in Self-Service Carolina (SSC) and that all billing notices will be sent to my USC assigned email address and that it is my responsibility to review and pay my bill by the due date.

(R. p. 1100 (emphasis added).) Thus, students agree to their "responsibility" to pay tuition and fees in exchange for the University's promise to provide them with the classes, instructional methods, and other services described in the "course registration." (*Id.*; R. pp. 1153–54 (University Bursar agreeing that "the university considers the student to be bound to pay all of the tuition and fees it assesses after they accept th[e] Statement of Financial Responsibility."); R. pp. 1072, 1082–84; R. p. 1116.)

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[1] https://web.archive.org/web/20230203033003/https://sc.edu/about/offices_and_divisions/provost/academicpriorities/keepteaching/guidance/index.php, accessed 6/12/2024.

After Appellants registered for their courses on Self Service Carolina, USC assessed fees based on their course selections for the Spring 2020 semester, consistent with the contract between the students and the school. (R. pp. 1153–54; R. p. 1073 ("Signing up for my classes and paying for those classes was my contract with the university."); R. p. 1115 ("I entered into an agreement with the University of South Carolina to pay for classes that I registered [for] and I registered for face-to-face classes.").) Appellants paid the University the tuition and fees it assessed pursuant to the Financial Responsibility Statement, including mandatory "technology" and "lab" fees. (R. pp. 1079–81, 1088–99; R. pp. 1109–10, 1120–31.)

C. In Response to the COVID-19 Pandemic, USC Transitioned to Emergency Remote Teaching.

On March 11, 2020, following the COVID-19 pandemic outbreak, University President Bob Caslen announced that classes would be canceled the week after Spring Break (March 16–22, 2020) and that all in-person, face-to-face classes would subsequently be moved to virtual instruction ("Emergency Remote Teaching" or "ERT"). (R. p. 1162; R. p. 955.) On March 19, 2020, USC extended ERT through the end of the semester. (R. pp. 1169–70, 1176–77; R. pp. 955–56.) This included the in-person, "face-to-face instruction" courses for which Appellants paid tuition and fees. (*Id.*; R. p. 605.) Moreover, Appellants were not allowed on campus to utilize the services and equipment for which they had paid fees—*e.g.*, art lab fee, language lab fee, and technology fee. (R. pp. 1085–86; R. pp. 1112–13.)

USC issued refunds for certain on-campus products and services such as housing, meals, and a $200 parking fee after concluding it was required to do so. (*See* R. p. 1101–03; R. pp. 1163–67.) Yet, the University issued no refunds (partial or otherwise) of tuition for "face-to-face instruction" or certain of the mandatory fees for on-campus services (including technology and lab fees) for which the students paid but the University failed to deliver.

D. USC Profited by Retaining Full Tuition and Fees for Services It No Longer Provided.

A deluge of complaints from both students and their parents followed from USC's refusal to issue partial refunds of the tuition and fees related to the "face-to-face instruction" and associated on-campus services that USC did not provide. (*See, e.g.*, R. p. 1212 (parent complains that "I feel that we are being charged tuition for a full class experience where we can communicate with the teachers in a face-to-face environment but are now being forced to learn from home); R. p. 1211 (University Bursar stating that "[s]ince the pandemic we have gotten countless complaints about the lab fees and technology fee being assessed for online classes."); R. p. 1214 (student complains: "The issue I have is that the fee is for lab supplies which are not being . . . utilized, therefore I do not understand why I am not having a portion returned to me."); R. p. 1155 (University Bursar internally remarking, "the university could have decided to refund tuition if we chose to."); R. p. 1222 (concerned parent "pleading with the powers that be" to provide "some fairness with tuition costs" and reconsider a "plan on reduction of tuition")).

Unsurprisingly given USC's refusal to return its students' payments for services USC was not providing, USC ran a budget surplus following the pandemic—comprised of over $58 million in net income (*i.e.*, profit) as of June 30, 2020. (R. pp. 1187–1207.)

E. Appellants Filed Suit Based on the Complete Lack of In-Person Instruction, Not the Quality of the Remote Instruction They Received.

Despite the University's undisputed cost savings resulting from the move to ERT and closure of its campuses and facilities, and the uproar from students and parents asking for a partial refund, the University kept the full value of tuition and fees it had collected from the Appellants and other students. Appellants therefore filed this lawsuit alleging claims for breach of contract, promissory estoppel, and unjust enrichment. As explained in the Second Amended Complaint, Appellants' claims are not based on the "quality" of the ERT they received but for

USC's failure to refund fees for services (including technology and lab fees) they did not provide as well as their failure to provide "in-person classes" (after agreeing to do so). (R. p. 174, ¶ 28.)

II. The Circuit Court Erred in Ignoring Evidence that Appellants Affirmatively Selected "Face-to-Face Instruction" and Considered It a Material Term in Their Contract with USC.

The circuit court, in rejecting Appellants' contract claim, committed both substantive and procedural errors. Substantively, it erroneously narrowed its analysis to a single document when several interrelated documents compromised the contract between the parties. Procedurally, it invaded the province of the jury by choosing between two reasonable interpretations of the contract.

A. The trial court misunderstood the relationship between the several instruments that specified the contract between Appellants and USC.

In finding that "the plain language of the Statement of Financial Responsibility [("SFR")] is clear and unambiguous" (R. p. 13), the trial court ignored the fact that the SFR expressly references the course registration, stating that: "[b]y submitting course registration I am entering into a financial arrangement with the University." (R. p. 1100.) Indeed, the trial court's analysis failed to even mention the course registration in Self Service Carolina. Had the court considered course registration, it would have had to deny summary judgment as the course registration expressly listed the Instructional Method for many of Appellants' courses as "Face-to-Face Instruction." By acting as if the course registration information simply does not exist, the court committed clear error because "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." *Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). Here, students sign the SFR and then immediately access the course registration in Self Service

Carolina (which students cannot access until they sign the SFR) to electronically select classes that they agree to pay for. Hence, these two instruments are executed in the course of the same transaction and the trial court erred by ignoring that fact. *See, e.g., Figueroa v. Point Park Univ.*, 553 F. Supp. 3d 259, 267 (W.D. Pa. 2021) ("Because the multi-faceted contractual relationship between a university and its students is generally not documented within a single integrated express writing, it is comprised of—and the courts look to—the many different representations provided to the students during their enrollment.").

The circuit court wrongly held that (1) the SFR did not incorporate the course registration; and (2) if the course registration was not incorporated in the SFR, it could not consider it. Both holdings are erroneous. Here, there is no evidence of an intent for the documents to be entirely separate; indeed, the record evidence is to the contrary. The SFR expressly states that: "***By submitting course registration*** I am entering into a financial arrangement with the University of South Carolina and I accept the responsibility for all charges billed to my account." (R. p. 1100, Statement of Financial Responsibility). Contrary to the trial court's holding, that statement ***does*** incorporate the course registration. Submitting a course registration is an active step that students must take to create a contractual relationship with USC. Hence, the trial court's irrelevant observation that the verbs submit and incorporate are different entirely misses the point. Even if the course registration had not been explicitly referenced in the SFR, the court was still obligated to consider the course registration as *Cafe Assocs.* required the court to read both documents together absent evidence of a contrary intention.

In any case, even without incorporation, the explicit reference in the SFR to the course registration at a minimum raises a jury question as to the contracting parties' intent as to whether

the SFR incorporates the course registration's terms. Nothing in the SFR shows that the parties did not want to treat the course registration as part of their contract, which is what *Cafe Assocs.* requires for the court to exclude the course registration from consideration. Indeed, while the trial court found the SFR embodies the entire agreement of the parties, the SFR does not contain an integration clause. Hence, the course registration is just as much part of the parties' contract as the SFR. *See RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984) (absent integration clause, consistent parol agreements not intended to be merged with final agreement are enforceable). The circuit court therefore erred by ignoring evidence of the parties' intent, favoring the moving party's factual interpretation of same, and by concluding, as a matter of law, that the two instruments are separate and that only the SFR constituted the contract between the parties.

B. Summary judgment was improper because the evidence supported more than one reasonable inference as to the parties' intent.

Binding precedent holds that when the terms of a contract "are ambiguous, the question of the parties' intent should be submitted to the jury." *Black v. Freeman*, 274 S.C. 272, 273, 262 S.E.2d 879, 880 (1980). The *Black* case considered a contract for carpentry work at a price of "$2.50 per sq. ft. $2.00 unfinished" that failed to specify the total number of square feet. *Id.* Naturally, the homeowner wished to pay only for "the heated space" whereas the carpenter demanded payment for "the entire square footage" of the house. *Id.* When the trial court directed a verdict for the carpenter, the Supreme Court reversed because the "contract omitted any mention of the disputed term and the evidence was capable of more than one reasonable inference as to the parties' intent."

Here, Appellants explicitly selected face-to-face instruction as the instructional method when signing up for classes. They testified at deposition that they considered receiving face-to-

face instruction to be a crucial part of their agreement with the university. (R. p. 1115 ("I entered into an agreement with the University of South Carolina to pay for classes that I registered [for] and I registered for face-to-face classes.").) And USC itself recognized that students "have an expectation that the class will be taught **in the method** that is specified in Self-Service Carolina." (University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022 (emphasis added).) Indeed, only a dean of the university can grant permission to change the instructional method. *Id.*

All this evidence, which the circuit court ignored, at the very least makes reasonable an inference that the contract includes as a material term the face-to-face instruction that Appellants explicitly selected. Indeed, the *Black* case shows that, even if the course registration was silent as to "face-to-face instruction," Appellants' claims should still survive summary judgment because the omission of the disputed term would have created a jury question. But here USC explicitly offered face-to-face instruction in writing, which Appellants accepted. If any party could have won summary judgment for its contract interpretation, it would only have been Appellants. Only by stacking errors (improperly narrowing the contract and ignoring contrary evidence) did the trial court come to a different conclusion.

The trial court's ruling also runs contrary to a legion of cases reaching the opposite conclusion and permitting breach of implied contract claims in COVID-19 tuition refund cases. *See, e.g.*, *Figueroa*, 553 F. Supp. 3d at 270-71 (holding university's "promotional materials, circulars, admissions papers, and publications" formed part of contract with students and evinced "a mutual understanding that tuition and other charges on students' accounts were paid for components of their traditional post-secondary education, i.e. one delivered in-person and on campus"); *Patel v. Univ. of Vermont & State Agric. Coll.*, 526 F. Supp. 3d 3, 14 (D. Vt. 2021)

("Drawing all reasonable inferences in Appellants' favor, a factfinder could conclude that UVM promised its students that their academic courses would be largely in-person and that they would receive the benefits of on-campus (and adjacent) facilities and activities."); *Bahrani v. Ne. Univ.*, No. 20-10946-RGS, 2020 WL 7774292, at *2 (D. Mass. Dec. 30, 2020) (holding further factual development needed to determine whether Appellants had contractual right to in-person instruction); *Salerno v. Fla. S. Coll.*, 488 F.Supp.3d 1211, 1217 (M.D. Fla. 2020) (college publications "clearly implied that courses would be conducted in-person," which sufficed to establish implied contract); *Verlanga v. University of San Francisco*, No. CGC-20-584829, 2020 WL 7229855, at *4 (Cal. Super. Nov. 12, 2020) ("When USF changed the nature of the educational and other services students reasonably expected to receive in exchange for their payments, it arguably breached its contracts with Appellants and other students.").

Moreover, none of the four COVID-19 tuition refund cases the trial court cited is on point because all of them involved students who had *no* written agreement with the school at issue. *Zwiker v. Lake Superior State Univ.*, 340 Mich. App. 448, 477, 986 N.W.2d 427, 443 (2022) (Appellants could not point to any contract language, and financial agreement contained integration clause); *Bergeron v. Rochester Inst. of Tech.*, No. 20-CV-6283 (CJS), 2023 WL 1767157, at *7 (W.D.N.Y. Feb. 3, 2023) (statements in course bulletins and online registration system that classes would be in specific locations insufficient; stating in dicta that, while some courts had found to the contrary, others had found an enforceable, specific promise of in-person instruction through registration); *Lindner v. Occidental Coll.*, No. CV 20-8481-JFW(RAOX), 2020 WL 7350212, at *8 (C.D. Cal. Dec. 11, 2020) (course catalogue, course schedule, and syllabi contained no specific promise of in-person instruction); *Miller v. Lewis Univ.*, 533 F.

Supp. 3d 678, 685 (N.D. Ill. 2021) (course schedule publication with notations concerning instructional method insufficient to form binding promise).

The trial court also extraneously noted that there is "no contractual provision entitling students to refunds of tuition or fees this far into the semester for any reason." (R. pp. 12–13.) That does not matter at all. The law does not require a contract to specify all of the consequences of breach as no drafter can foresee all future contingencies. The absence of such a provision says nothing about whether the parties intended for USC to provide face-to-face instruction.

The trial court also remarked that "the uncontroverted evidence submitted by USC demonstrates that students might not even see the instructional method at all after signing the SFR and completing registration because there was more than one way to register, and the information about 'Face-to-Face Instruction' would be conveyed only if the student clicked certain links." (R. p. 15.) There are several problems with this observation. First, trafficking in speculation about what students "might" or might not see in favor of the moving party is clear error on summary judgment. Second, the circuit court fails to explain why that fact even matters in terms of whether the course registration is part of the contract – it is hornbook law that a contract is binding even if a party does not read all the terms. Third, it is telling that the circuit court chose to cite this irrelevant fact while ignoring undisputed evidence that Appellants *did* see the instructional method, which is directly relevant to proving the terms of the contract. Such persistent failure to view the evidence in the light most favorable to the non-moving party strongly suggests that the trial court's analysis was results-oriented.

Finally, the trial court states that holding the course registration to be part of the contract "would open USC to breach of contract claims every time it did not provide the same professor

for a class . . . or when the location of a class changed." (R. p. 15.) It is not, however, the circuit court's province to consider the possible results of the parties' competing interpretations at summary judgment and choose the interpretation it thinks is more prudent. *See, e.g.*, *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, LLC, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) ("The determination of the parties' intent is [] a question of fact for the jury to determine."). Regardless, the court's comment overstates this concern as showing breach is only one element of a contract claim. It is unlikely that any students would sue USC if a class moved from room 101 to room 102, and they certainly would be unable to prove damages. That is decidedly not the case here, and the court's policy argument cannot justify its choice to rewrite the parties' agreement in the moving party's favor.

Moreover, if the trial court had wished to consider the logical implication of its holding that course details are not part of the contract at all, public policy would weigh heavily in favor of the students. That is, by the court's interpretation, a student who signed up and paid for Spanish classes, and then received instruction in music from USC, would have no claim. Similarly, suppose the COVID-19 pandemic never happened, but USC decided to move all classes online simply to save money. The trial court's analysis would result in no breach of contract in that hypothetical either, which is an absurd outcome.

Because the circuit court erred by ignoring record evidence raising a genuine factual dispute about whether the parties understood that USC would provide in-person instruction in exchange for Appellants' fees and tuition payments, this Court should reverse the grant of summary judgment.

C. USC's purported reservation of rights to amend its course schedule presents a jury question about the meaning of the contract, which the trial court improperly resolved in favor of the moving party.

The trial court also improperly decided contested factual issues when it found that USC's boilerplate disclaimer in its academic bulletin that it "reserve[d] the right to make changes in curricula, degree requirements, course offerings, or academic regulations at any time" meant USC had no obligation to offer any specific classes in any specific manner. (R. p. 17.) It is particularly ironic that the court could reach this conclusion while at the same time holding the course registration did ***not*** create a contractual obligation or otherwise impose any obligation on USC.

The trial court erred in concluding that the bulletin formed part of the contract, which is a disputed issue. Importantly, "whether a section of a catalogue or bulletin is part of an implied contract between a student and a university 'center[s] around what is reasonable' and is 'generally a question of fact.'" *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2021 WL 3560783, at *4 (C.D. Cal. Aug. 6, 2021). The disclaimer language in USC's bulletin did not become part of the contract for several reasons.

First, and most obviously, the bulletin itself expressly noted that the disclaimer "is for information purposes only and **does not constitute any contractual agreement between a student and the University of South Carolina**." (R. pp. 674–719 (emphasis added.) As a result, this bulletin could not possibly have become part of the terms of the contract between USC and Appellants. Second, although the trial court stated that the academic bulletin was provided to students during course registration in Self Service Carolina, the record evidence shows the opposite. (*See* R. pp. 1118–19 ("I don't recall ever seeing this specific bulletin.")). Nothing in the text of the bulletin itself shows that it was available through Self Service

Carolina, nor did it contain a signature or acknowledgment page. (R. p. 674.). Hence, the trial court made unsupported factual assumptions in favor of the moving party, which is the opposite of the summary judgment standard.

That is why this case stands apart from the Eleventh Circuit's *Dixon* case, where Appellants relied on handbook regulations and procedures, which themselves contained a reservation of rights, to prove contractual promise of in-person education. *Dixon v. Univ. of Miami*, 75 F.4th 1204, 1209 (11th Cir. 2023). If the reservation of rights had shown up in the SFR or course registration, which specified the terms of the contract between Appellants and USC, that would present a different question. But here, there is no evidence that the academic bulletin is part of the contract between the parties, and the trial court erred in determining this factual issue when confronted with conflicting evidence.

III. The Circuit Court Erred in Applying Sovereign Immunity Based on Its Erroneous Contract Interpretation.

For the same reasons discussed above, this Court should reverse the circuit court's sovereign immunity ruling, which is entirely reliant on its erroneous finding that there was no "express contractual promise to provide educational instruction and services in person or in any specific modality." (R. p. 30.) Because summary judgment on this point was erroneous, so too was the court's application of sovereign immunity on the same basis. Moreover, because unjust enrichment and promissory estoppel are quasi-contract claims, they are not barred by sovereign immunity. *See Kinsey Constr. Co. v. S.C. Dep't of Mental Health*, 272 S.C. 168, 171, 249 S.E.2d 900, 902 (1978), *partially overruled on other grounds, Unisys Corp. v. S.C. Budget and Control Bd.*, 346 S.C. 158, 166, 551 S.E.2d 263, 268 (2001); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (unjust enrichment claim sounds in quasi-contract); *N.*

Am. Rescue Prod., Inc. v. Richardson, 411 S.C. 371, 379 (2015) ("Promissory estoppel is a quasi-contract remedy.").

IV. The Circuit Court Improperly Invaded the Province of the Jury by Ruling, as a Matter of Law, That Appellants Suffered No Legal Injury When USC Declined to Provide Face-to-Face Instruction.

The circuit court is incorrect when it claims that Appellants suffered no damage from the transition to online instruction because they completed their coursework and earned credits toward graduation. (R. p. 9–10.) That is not how contract law works. A party is entitled to the benefit of their bargain, and receiving a different product is, by itself, a legally cognizable harm. Imagine if a customer went to a restaurant, ordered chocolate ice cream, and received broccoli instead. Eating the broccoli will provide calories, just the same as ice cream. Indeed, broccoli is more nutritious, and the customer would likely emerge healthier after consuming it rather than ice cream. Yet it is untenable to claim that the customer suffered no legally cognizable harm when she did not receive the ice cream she ordered. The same logical error defeats the circuit court's analysis. The students suffered harm by not receiving the in-person instruction they contracted for, *regardless of what substitute USC provided.* In other words, contrary to the court's opinion, different *is* necessarily harmful under contract law (unless the breaching party can prove substantial performance, which is a fact-bound determination inappropriate for summary judgment). (R. p. 10.) This Court should correct the circuit court's erroneous understanding of contract law.

Moreover, even if online education is just as good as in-person instruction (as the circuit court insists, while acting improperly as fact finder), that would still not defeat the breach of contract claim because South Carolina, like virtually all jurisdictions, recognizes that nominal damages are permissible "when a right is violated, regardless of whether general damages can be proven." *J & W Corp. of Greenwood v. Broad Creek Marina of Hilton Head, LLC*, 441 S.C.

642, 669-70, 896 S.E.2d 328, 343 (Ct. App. 2023) (reversing decision not to award nominal damages); *Grooms v. Med. Soc. of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989) ("The law presumes the existence of at least nominal damages for the violation or infringement of a legal right."). So Appellants are entitled to have a jury determine if USC breached the contract and then to determine whether to award nominal damages, even assuming, counterfactually, there is no meaningful difference between in-person learning and ERT. *See, e.g.*, *56 Leinbach Invs., LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 478–79, 769 S.E.2d 242, 249 (Ct. App. 2014) ("Because Magnolia's normal use of the property was not substantially interfered with, it was not entitled to abate rent . . . , but Magnolia is entitled to nominal damages for Leinbach's breach."). For this reason, too, the Court should reverse the trial court's ruling on this point.

The trial court's holding that, because Plaintiff Bunch used scholarships to pay for class (rather than out of pocket), she had no standing (R. p. 11) simply illustrates further its confusion about contract law. The harm is not the tuition and fees she paid; the harm is the in-person instruction she never received. Suppose customer A pays Best Buy $1,000 for a TV, customer B pays $500 for the same model, and customer C is supposed to receive one as a gift purchased by her friend, and Best Buy then failed to deliver any of the three TVs. All three customers suffered the exact same harm: not receiving a TV. All three of them can sue for breach of contract, and a court would award all three of them the fair market value of a TV (even though customer B got a bargain and customer C did not pay out of pocket). *See, e.g.*, *Ninivaggi v. Univ. of Delaware*, No. 20-cv-1478, 2023 WL 2734343, at *2 (D. Del. Mar. 31, 2023) (finding students who paid for tuition "with money from outside sources" had standing because "[t]hose students, no less than

students who paid out of their own pockets, were parties to the contract that U. Delaware allegedly breached").

V. The Circuit Court Erred in Misconstruing Appellants' Claims in Order to Rely on the Inapplicable Educational Malpractice Doctrine.

The analysis in the previous section also makes clear why the educational malpractice doctrine is entirely a red herring in this case. The harm complained of is not receiving online instruction rather than in-person instruction. Instead, the harm is not receiving in-person instruction. The quality of the substitute product USC provided may go toward limiting the damages Appellants suffered, but it is not any part of the factual basis of Appellants' claim. Appellants here are not complaining about the quality of online instruction but about the fact they never received *any* in-person instruction at all after Spring Break. Hence, the educational malpractice doctrine is inapplicable.

Appellants made this point clearly in the operative Second Amended Complaint: "Appellants' claims are **not based on the (doubtlessly inferior) quality** of the emergency remote instruction they received through their online classes. Rather, Appellants paid tuition for in-person classes, Defendant, through its course registration and description materials, obligated itself to provide these classes, and then **did not do so**." (R. p. 174, ¶ 28 (emphasis added).) On summary judgment, the circuit court was obligated to "liberally construe the pleadings" in favor of Appellants, the nonmoving party, and "give [them] the benefit of all favorable inferences that might reasonably be drawn therefrom." *Andrews v. Amisub of S.C., Inc.*, 302 S.C. 122, 124, 394 S.E.2d 22, 23 (Ct. App. 1990). But the circuit court did just the opposite by rewriting Appellants' claims, transforming them into something they are not.

Because the trial court misunderstands the measure of damages in this case, it erroneously injects the educational malpractice doctrine into a case where Appellants never

challenged a single pedagogical decision USC made. Appellants here did not receive any in-person instruction after the unilateral switch to ERT. Therefore, they are entitled to the entire value of that instruction. USC may be able to *offset* that amount by proving the value of the online instruction it offered, but that would be USC's burden of proof. Appellants are not required to calculate any difference between in-person and online instruction at this stage.

Furthermore, while conceding a split in authority on the educational malpractice issue, the trial court's opinion failed to state just how in the minority its position has become. *See, e.g.*, *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2021 WL 3560783, at *3 (C.D. Cal. Aug. 6, 2021) (collecting cases) ("Courts addressing similar claims for COVID-19-related tuition refunds have concluded that California's educational malpractice doctrine does not bar claims that the university breached a specific promise of in-person classes and experiences."). Accordingly, the circuit court erred in applying the educational malpractice doctrine to bar Appellants' claims.

VI. The Circuit Court Erred in Its Impossibility Doctrine Analysis by Deciding the Factual Question of Substantial Equivalence as a Matter of Law.

The trial court committed legal error in allowing USC to retain all of the tuition payment based on the impossibility defense. That is, even if successful, impossibility does not permit USC to *keep the money it received from Appellants*. The effect of the impossibility doctrine is to excuse both parties' performance, not just one side. *Meng v. New Sch.*, No. 23-CV-3851(JSR), 2023 WL 5162181, at *5 (S.D.N.Y. Aug. 11, 2023) ("[T]he remedy for impossibility, or its related and more applicable principle, frustration of purpose, is rescission of the contract. For this reason, TNS's impossibility defense would not relieve it of its obligation to return any portion of the tuition or fees plaintiff paid to which the university is not entitled.") (citation and quotation marks omitted); *Omori v. Brandeis Univ.*, 635 F. Supp. 3d 47, 57 (D. Mass. 2022)

(same); E. Allan Farnsworth, Contracts § 9.9 at 642 (4th ed. 2004) ("The excused party's failure to perform because of impracticability or frustration affects the other party's duties of performance in the same way as if the excused party had broken the contract."); Restatement (Second) of Contracts § 267 (party's failure to render performance may affect other party's duties even though failure to perform justified).

Numerous courts have recognized this rule in the context of COVID-19 tuition refund cases. *See, e.g.*, *In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, No. CV 20-4928-DMG (KSX), 2023 WL 2576766, at *6 (C.D. Cal. Mar. 7, 2023) (partially denying university's summary judgment motion based on impossibility arguments because, "where . . . performance of an otherwise valid contract has been rendered impossible, a plaintiff may still pursue restitution on a quasi-contract theory"); *In re Bos. Univ. COVID-19 Refund Litig.*, No. CV 20-10827-RGS, 2023 WL 2838379, at *3 (D. Mass. Apr. 7, 2023) ("Appellants correctly note that, even if performance is excused, [the university] must still provide restitution for the difference in value between what they were promised and what they received."). Accordingly, even if this Court were to find the impossibility defense applicable here, summary judgment was inappropriate as USC was still liable to return the portion of tuition and fees it collected for services not rendered.

The trial court also stated, without any factual or legal support, that USC's provision of online instruction constituted "substantially equivalent substitute performance." (R. p. 28 (no citation to any record evidence).) That is a question of fact that ***must*** go to the jury. The whole point of this lawsuit is that Appellants do not consider online instruction substantially equivalent to in-person instruction. For all these reasons, the circuit court's impossibility analysis was erroneous.

VII. The Circuit Court Erred in Concluding that Appellants Had to Immediately Quit School During the Pandemic Instead of Accepting Virtual Instruction In Order to Bring This Lawsuit.

The doctrine of acquiescence is an equitable doctrine that presents inherently factual questions that are inappropriate for adjudication at summary judgment. Under the doctrine of acquiescence, "if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief." *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955).

It is clear that Appellants here did not simply stand by and fail to object. To the contrary, this lawsuit was filed immediately after the end of the Spring 2020 semester. Moreover, USC never relied to its detriment on any decision by *Appellants*. There is no dispute USC would have switched to online instruction whether Appellants continued to remain enrolled or not. Without some detrimental reliance by the University, the doctrine of acquiescence does not apply. *See Bauckman v. McLeod*, 429 S.C. 229, 245, 838 S.E.2d 208, 216 (Ct. App. 2019) (no estoppel based on acquiescence without showing of detrimental reliance).

The trial court erroneously held that Appellants waived their right to bring a breach-of-contract claim when they did not immediately drop out of college upon learning of the University's unilateral change to ERT. Indeed, the Appellants had a duty to mitigate their damages, and it would be absurd to require students to drop out of college mid-semester to preserve their contractual rights. *See Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) ("A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages"); *see also* 23 Williston on Contracts § 63:9 (4th ed.) ("An intent to acquiesce or waive is essential to establish a waiver of a breach of contract, and the waiver must therefore be a voluntary,

intentional relinquishment of a known right"). As such, the circuit court's application of the acquiescence doctrine was error.

VIII. There is Sufficient Record Evidence for the Jury to Consider Appellants' Alternative Promissory Estoppel and Unjust Enrichment Claims.

The circuit court erred in granting summary judgment on Appellants' promissory estoppel and unjust enrichment claims. "Promissory estoppel is a quasi-contract remedy." *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015). "Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property." *Satcher v. Satcher*, 351 S.C. 477, 483–84, 570 S.E.2d 535, 538 (Ct. App. 2002). One of the elements of promissory estoppel is proof of "a promise unambiguous in its terms." *A&P Enterprises, LLC v. SP Grocery of Lynchburg, LLC*, 422 S.C. 579, 587, 812 S.E.2d 759, 763 (Ct. App. 2018).

Contrary to the trial court's ruling, the evidence shows that USC ***did*** make "an unambiguous promise" to provide in-person instruction. (R. p. 34.) USC did so by listing face-to-face instruction as the instructional method for classes Appellants selected and paid for. *See supra* Part II.A. Thus, face-to-face instruction is a "clearly articulated, definite term[]." (*Id.* (quoting *Barnes v. Johnson*, 402 S.C. 458, 470, 742 S.E.2d 6, 11-12 (Ct. App. 2013).) It is entirely unclear what the trial court thinks is "vague" about this term; its analysis contains only *ipse dixit* assertions. (*Id.*) And the *A&P Enterprises* case the trial court cited is entirely distinguishable because the promisees in that case failed to "present *any* terms as part of an alleged agreement" made orally. 812 S.E.2d at 764. Here, by contrast, Appellants have

identified a definite promise by USC *in writing* for in-person instruction, which USC disputes.[2] Thus, issues of material fact exist that preclude summary judgment on this alternative claim.

Unjust enrichment is also a quasi-contract claim that is validly pleaded in the alternative to a breach of contract claim. *Mod. Pharmacy, LLC v. J M Smith Corp.*, No. 7:19-CV-1218-TMC, 2020 WL 13491295, at *5 (D.S.C. Mar. 25, 2020). The circuit court improperly failed to construe the facts in the light most favorable to Appellants and summarily concluded that it was not "inequitable for USC to retain payment of full tuition and academic fees for the Spring 2020 semester," drawing inferences and making value judgments that should have been left for the jury. (R. p. 35.) This was reversible error. *See Nelson*, 362 S.C. at 5 ("Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.").[3]

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[2] The circuit court noted that Plaintiff Kelly could not maintain a promissory estoppel claim as to her classes that the syllabi said would not be exclusively face-to-face. That, of course, in no way justifies the court's decision to grant summary judgment as to the entire claim, which also includes courses that USC promised would be taught in-person. (Op. at 30 n.18.)

[3] The circuit court also found that Appellants' equitable claims were barred because the dispute was governed by contract. However, as discussed above, the parties dispute whether a contract for in-person classes ever existed. Thus, in the event this Court reverses the circuit court's breach-of-contract decision, it should also reverse the order insofar as it relied on the same reasoning to bar Appellants' equitable claims. *See, e.g.*, *T-Zone Health Inc. v. SouthStar Cap. LLC*, No. 2:20-CV-02519-DCN, 2023 WL 5021952, at *7 (D.S.C. Aug. 7, 2023) ("the court finds it would be premature to grant summary judgment on T-Zone's promissory estoppel claim because the breach of contract claim is brought in the alternative and remains unresolved").

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the circuit court's decision granting summary judgment as to Appellants' breach of contract, promissory estoppel, and unjust enrichment claims, and remand for further proceedings.

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